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ENVIR. APPEALS BOARD

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March 20, 2007

**VIA FEDERAL EXPRESS**

U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
Colorado Building  
1341 G Street, NW 600  
Washington, D.C. 20005

Re: **In the Matter of Dominion Energy Brayton Point LLC  
Brayton Point Station  
Renewal of NPDES Permit No. MA 0003654  
NPDES Appeal No. 07-01**

Dear Sir or Madam:

On behalf of Dominion Energy Brayton Point, LLC, the Permittee and Petitioner, I am herewith submitting for docketing and review by the Environmental Appeals Board an Opposition to Region 1 Motion to Strike and accompanying Certificate of Service.

Thank you for your attention to this matter.

Very truly yours,

John M. Stevens

JMS:mlb  
Enclosures

cc: Linda Murphy, EPA Region I  
Mark A. Stein, Esq., EPA Region I  
Joseph L. Callahan, Esq.  
Ann Morill, Esq.  
Tricia K. Jedele, Esq.  
Wendy A. Waller, Esq.  
Robert G. Brown, Esq.  
Brian Wagner, Esq.  
Carol Lee Rawn, Esq.  
Jerry Elmer, Esq.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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In re: Dominion Energy Brayton )  
Point, LLC (formerly )  
USGen New England, Inc.) )  
Brayton Point Station )  
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 )  
NPDES Permit No. MA 0003654 )  
\_\_\_\_\_ )

**NPDES Appeal No. 07-01**

**OPPOSITION TO REGION 1 MOTION TO STRIKE**

Dominion Energy Brayton Point, LLC (the "Petitioner," the "Permittee" or "Brayton Point Station") hereby opposes EPA Region 1's Motion To Strike Exhibits "A" through "F" (the "Exhibits") and certain portions of Table 1 to Brayton Point Station's Petition for Review of the Region's November 30, 2006 Determination on Remand, as well as arguments related to those materials. The Exhibits set forth material that Brayton Point Station would have submitted by way of comment had the Region not denied its request to re-open the record for public comment following the remand by the Board. In its Motion To Supplement the Administrative Record, the Petitioner requested that the Board either remand with instructions to re-open the comment period, treat the Exhibits as part of the administrative record, or consider them as a supplement to the record.

Region 1's lengthy submission in support of its Motion provides no meritorious reason why the Board should not consider the Exhibits. Indeed, it appears there is no precedent, relevant to the circumstances present here, for the Region's making additions to the record while

denying the Petitioner and other interested parties an opportunity to do the same. Not one of the decisions referenced in the Region's brief involves approval by the Board of a region's decision to re-open the record to add additional material itself but to deny the public an opportunity to comment during a remand following a determination by the Board that the region's explanation of the basis for certain permit conditions had been insufficient. Most of the Board decisions that the Region cites in its Motion To Strike involve a region's decision whether to re-open the comment period following receipt of initial comments and before the filing of a petition for review. The only cited decision in which a region supplemented the administrative record without re-opening the public comment period following a remand arose in the context of a remand taken voluntarily by the region shortly after the filing of a petition and before any substantive involvement by the Board, circumstances that, in substance, did not differ at all from a decision by a region to supplement its response to comments before a petition was filed. *See In re NE Hub Partners*, 7 E.A.D. 561 (EAB 1998).

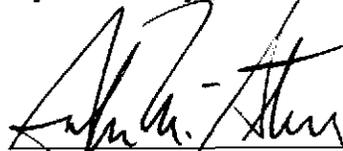
In addition, the Region takes positions inconsistent with those it takes in other simultaneous submissions to the Board. For example, the Region repeatedly contends that Brayton Point Station's remedy is not the submission of additional comments before the Region, but rather an appeal to the Board. At the same time, in its Response to Petition for Review, the Region argues that the Board should deny the petition and not allow an appeal.

Finally, the Region's contention that the length of the Brayton Point Station permit proceedings counsel against re-opening the record for comment is not supported by the record. The Board remanded the matter to the Region on the first day of February 2006; the Region issued its Determination on Remand on the last day of November 2006. That ten-month period easily could have incorporated a public comment period.

Finally, the Board should not countenance the Region's suggestion that Brayton Point Station is somehow to be faulted for not having made substantive submissions during the remand without the Region's express invitation for such comments. Promptly upon the remand by the Board, by letter dated February 17, 2006, Brayton Point Station requested that the Region re-open the record and accept public comment on the substantive issues remanded. (R. 16; AR 4023). Six weeks later, by letter dated April 6, 2006, the Region stated that it had "not yet decided whether or not to re-open the record for additional public comment." There was no suggestion in that letter that material could be added to the record by means other than public comment. (R. 17; AR 4024). Brayton Point Station first learned the Region had decided not to accept public comment when it received the November 30, 2006 Determination on Remand.

For the foregoing reasons, the Board should deny Region 1's Motion To Strike and grant Brayton Point Station's Motion To Supplement the Administrative Record.

By its attorneys,



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Date: March 20, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that on March 20, 2007 I served a true copy of the Opposition To Region 1 Motion To Strike by mailing a copy thereof, postage prepaid, to the following:

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